No. 86-952

In the Supreme Court of the United States

OCTOBER TERM, 1986

DANIEL L. FIERRO, PETITIONER

v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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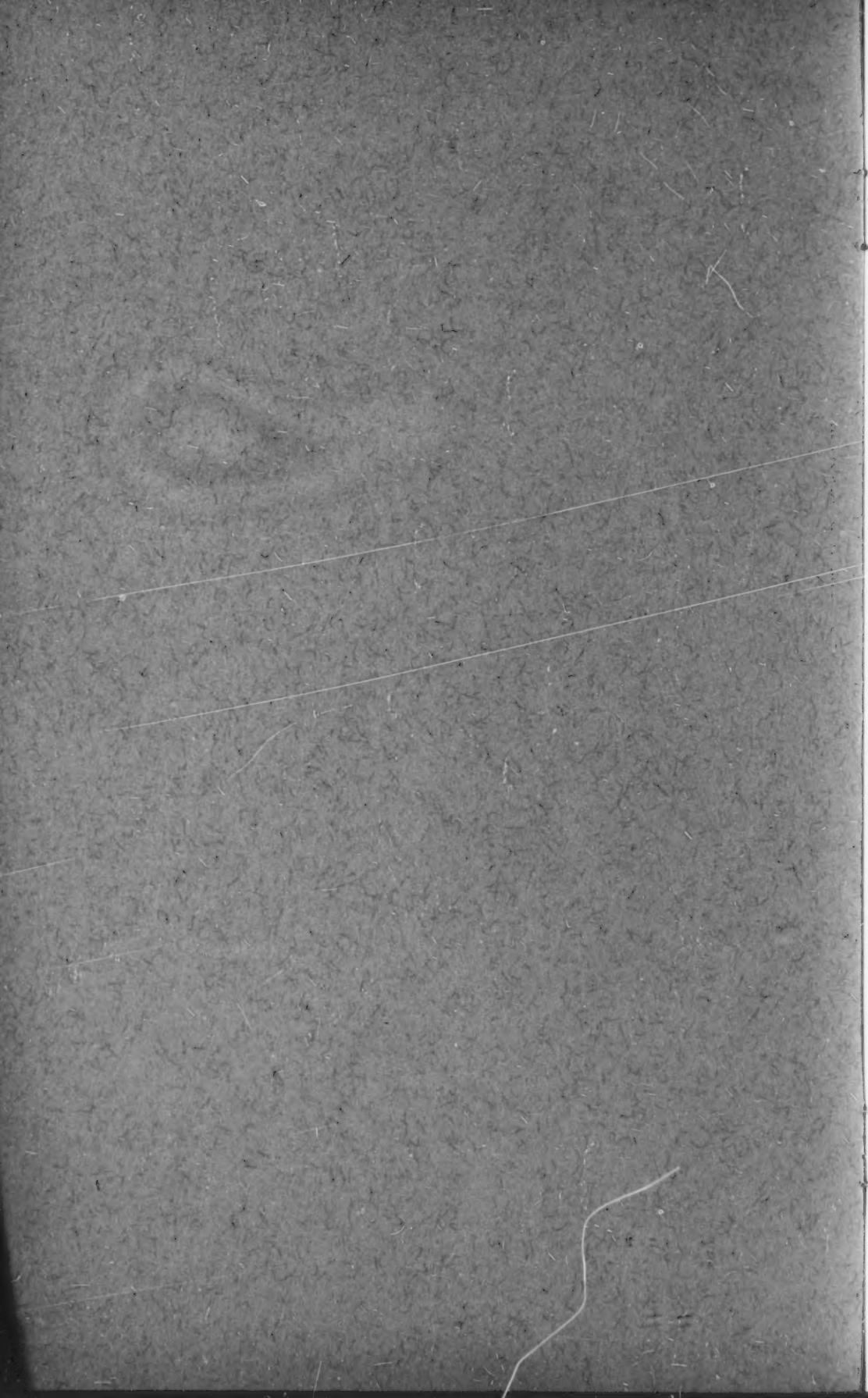

TABLE OF AUTHORITIES

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Petitioner contends that the Social Security Administration Appeals Council lacked the authority to review on its own motion the decision of an administrative law judge awarding social security benefits to petitioner.

1. In October 1980, petitioner applied for disability and supplemental security income benefits under the Social Security Act. His claim was based on a neck injury sustained in an automobile accident and a previous injury to his left arm. Petitioner's application initially was denied; he then sought de novo review before an administrative law judge (ALJ), who granted the claim for benefits. The Appeals Council reviewed the case, vacated the ALJ's decision, and directed the ALJ to order psychiatric and psychological testing of petitioner. Pet. App. 3, 18.

The ALJ obtained this additional evidence and again found petitioner to be disabled. The Appeals Council decided to review the ALJ's decision, citing a regulation that directs the Appeals Council to exercise its review

authority where it believes that the ALJ's decision is "not supported by substantial evidence" (20 C.F.R. 404.970(a)(3)). The Appeals Council denied petitioner's application for benefits on the ground that petitioner was not disabled within the meaning of the Social Security Act. The Appeals Council's decision became the final decision of the Secretary pursuant to 20 C.F.R. 404.981 and 404.1481. See Pet. App. 3-4, 18-19.

Petitioner commenced this action for judicial review of the Secretary's decision in the United States District Court for the District of New Mexico. The district court upheld the Secretary's position. It concluded that substantial evidence supported the Appeals Council's determination that petitioner was not disabled (Pet. App. 17-40).

The court of appeals unanimously affirmed (Pet. App. 1-16). Petitioner contended that the threshold question on judicial review was whether *the ALJ's* decision was supported by substantial evidence, a contention based on the theory that the Appeals Council's jurisdiction to review the ALJ depended upon how that threshold question was answered. The court of appeals rejected this argument, concluding that the Appeals Council has "overriding power to review any decision of an ALJ" (*id.* at 11). The fact that the Appeals Council initially had assigned, as its reason for review, the possibility that the ALJ's decision was not supported by substantial evidence, did not in the Tenth Circuit's view mean that a reviewing court must "first examine the ALJ's decision and determine whether it is supported by substantial evidence" (*ibid.*). Concluding that "that task of the judiciary * * * is to review the decision of the Secretary and not that of the ALJ," the court proceeded to consider whether the Appeals Council's decision was supported by substantial evidence (*id.* at 13). It found that substantial evidence in fact supported the Appeals Council's determination that petitioner was not entitled to benefits (*id.* at 14-16).

2. Petitioner contends that the ALJ's decision was assertedly supported by substantial evidence and hence that the Appeals Council lacked authority to review that decision. The decision of the court of appeals rejecting petitioner's argument is correct and does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), authorizes judicial review of "any final decision of the Secretary." That Section further states that "[t]he findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive" (*ibid.*). And the relevant regulations make clear that where the Appeals Council issues a decision, that decision constitutes the final decision of the Secretary. See 20 C.F.R. 404.900, 404.981, 404.1400, 404.1481. The task of a reviewing court under Section 205(g), therefore, is to determine whether the Appeals Council's decision is supported by substantial evidence.

Petitioner's argument would invert this statutory scheme. He would require a reviewing court to apply the substantial evidence standard to the ALJ's decision on the ground that the jurisdiction of the Appeals Council turns upon whether the ALJ's decision is supported by substantial evidence. It is true that the Secretary has by regulation directed the Appeals Council to review four specified categories of ALJ decisions, including decisions in which "the action, findings or conclusions of the [ALJ] are not supported by substantial evidence" (20 C.F.R. 404.970(a)(3)). But a companion regulation states that "[a]nytime within 60 days after the date of the hearing decision or dismissal [by an ALJ], the Appeals Council itself may decide to review the action that was taken" (20 C.F.R. 404.969). Section 404.969 thus "authorizes the Appeals Council to review any ALJ decision under its own

motion review authority," and Section 404.970(a) "merely indicates the kinds of decisions the Appeals Council will review" (*Bauzo* v. *Bowen,* 803 F.2d 917, 921 (7th Cir. 1986)). As the court below noted, the Secretary's interpretation of his own regulations is "entitled to great deference" (Pet. App. 9). When the provisions of the two regulations are read together, it is clear that "the limited purpose of § 404.970(a) is to advise claimants of those kinds of cases in which the Appeals Council will exercise its power under § 404.969" (*Bauzo* v. *Bowen,* 803 F.2d at 921-922).

Indeed, every court of appeals that has addressed the issue has agreed with the court below that the Appeals Council has plenary authority to review the decision of an ALJ and that a reviewing court must apply the substantial evidence test to the decision of the Appeals Council, not to the decision of the ALJ. *Lopez-Cardona* v. *Secretary of Health & Human Services,* 747 F.2d 1081, 1082-1083 (1st Cir. 1984); *Welch* v. *Heckler,* 808 F.2d 264, 266-268 (3d Cir. 1986); *Kellough* v. *Heckler,* 785 F.2d 1147, 1149-1151 (4th Cir. 1986); *Deters* v. *Secretary of Health, Education & Welfare,* 789 F.2d 1181, 1184-1185 (5th Cir. 1986); *Mullen* v. *Bowen,* 800 F.2d 535, 539-546 (6th Cir. 1986) (en banc); *Bauzo* v. *Bowen,* 803 F.2d at 920-922; *Baker* v. *Heckler,* 730 F.2d 1147, 1149-1150 (8th Cir. 1984); *Taylor* v. *Heckler,* 765 F.2d 872, 874-875 (9th Cir. 1985); *Parker* v. *Bowen,* 788 F.2d 1512, 1516-1520 (11th Cir. 1986) (en banc).[1]

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[1] The mere fact that the Appeals Council cites the possible absence of substantial evidence as the factor triggering its decision to review an ALJ's determination does not mean that the Council's *jurisdiction* turns on the presence of substantial evidence. As one court has observed, "[t]he Council may believe * * * that the case fits [a category of mandatory review], but it may turn out, after full examination, that this initial impression was mistaken. We do not believe that the Council is then required to abandon its own review and to allow the ALJ's

Petitioner's claim that there is a conflict among the courts of appeals with respect to the question presented here (Pet. 7-9) rests entirely upon cases that have been overruled. Thus, petitioner relies (Pet. 8, 23) upon *Newsome* v. *Secretary of Health & Human Services,* 753 F.2d 44 (6th Cir. 1985), but that decision was overruled by the en banc Sixth Circuit in *Mullen* v. *Bowen,* 800 F.2d at 542. Petitioner cites (Pet. 8, 23) *Scott* v. *Heckler,* 768 F.2d 172 (7th Cir. 1985), but that decision was overruled by the Seventh Circuit in *Bauzo* v. *Bowen,* 803 F.2d at 919 n.*, 921. And petitioner invokes (Pet. 15) some language in *Parris* v. *Heckler,* 733 F.2d 324 (4th Cir. 1984), but petitioner's interpretation of that passage from *Parris* was rejected by the Fourth Circuit in *Kellough* v. *Heckler,* 785 F.2d at 1149-1150. All of the courts of appeals are thus in agreement with the rule applied by the court below in the present case, and there is no warrant for review by this Court.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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decision to stand, even when it has a definite and firm conviction that the ALJ was mistaken." *Baker* v. *Heckler,* 730 F.2d at 1150; see also *Welch* v. *Heckler,* 808 F.2d at 267 n.2.

[2] Petitioner refers (Pet. 9) to the petition for a writ of certiorari in *Escalante* v. *Bowen,* No. 85-1726, but that petition was dismissed on July 22, 1986, pursuant to Rule 53 of the Rules of this Court. Petitioner also cites several district court decisions (Pet. 8), but those decisions do not create a conflict warranting review by this Court. Moreover, those cases all arose in circuits that have since adopted a rule identical to the one adopted by the court below.

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